

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 March 2025

**Public Authority:** Department of Health and Social Care (DHSC)  
**Address:** 39 Victoria Street  
London  
SW1H 0EU

### **Decision (including any steps ordered)**

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1. The complainant has requested communications between Professor Whitty and the Antivirals and Therapeutics Taskforce about Evusheld. The DHSC initially stated no information was held but later revised its position to refuse the request as vexatious.
2. The Commissioner's decision is that the public authority was not entitled to refuse to comply with the request on the basis of section 14(1) FOIA.
3. The Commissioner requires the DHSC to take the following steps to ensure compliance with the legislation:
  - Issue a fresh response which does not rely on section 14(1) FOIA.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court

### **Request and response**

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5. On 6 March 2024 the complainant resubmitted a request they had made in December 2022. This request had been refused as the DHSC stated

no information was held. The complainant had reason to challenge this assertion so resubmitted the request in the following terms:

"For the period 1 April 2022 to 6 September 2022, I requested:

All direct communications between the Chief Medical Officer and the Antivirals and Therapeutics Taskforce (should this have its own email address or electronic identity) in which Evusheld (i.e. the combination of Tixagevimab and Cilgavimab, AZD7742 or any other name that is used by the DHSC for this) is mentioned, whether:

- 1 – by email; or
  - 2 – other electronic means."
6. The DHSC responded on 28 March 2024 stating the Antivirals and Therapeutics Taskforce had two email addresses and these had been searched, along with WhatsApp and no communications between the Chief Medical Officer (CMO) and the Taskforce had been found.
  7. The complainant requested an internal review on 27 May 2024. They pointed to an email they had received with the subject line "RAPID C-19 report to the CMO on Evusheld (AZD7442)" which was sent by a member of the Taskforce directly to the CMO and Deputy CMO. The complainant also stated they had seen the reply to this email so challenged the DHSC's assertions that no information or communications existed between the CMO and the Taskforce in scope of the request.
  8. The DHSC conducted an internal review and responded on 18 June 2024. It confirmed after repeated searches no information had been located. It explained the email the complainant referred to had been copied to a distribution list and not to a Taskforce mailbox.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 21 July 2024 to complain about the DHSC's response to their request.
10. During the course of the Commissioner's investigation the DHSC's position changed significantly. Firstly the DHSC questioned whether the Commissioner should investigate the complaint as he had previously

served a decision notice<sup>1</sup> finding the complainant's requests on this subject to be vexatious.

11. The Commissioner explained that as the DHSC had not refused this request as vexatious and the complainant had grounds for questioning the DHSC's position the case had been accepted for investigation.
12. The DHSC reconsidered the request and explained that the timeframe of the request covered a significant time period in Government with three Prime Ministers and three Secretaries of State of Health and Social Care. As such a lot of emails were forwarded and re-forwarded during this time. After reconsidering the request the DHSC now considered the amount of emails that may be in scope of the request was in fact so substantial it would likely exceed the cost limit (section 12 FOIA) to comply with the request.
13. The DHSC explained they had looked at a sample of 41 emails sent from the CMO's email address and there were three email chains that were duplicates so responding to the request would require sifting through over 6000 emails (14,500 items once attachments were included) to remove duplicates and review any in-scope emails to see if they could be disclosed.
14. The Commissioner explained this position to the complainant and they suggested their request could be narrowed to include any emails where 'Evusheld' was directly stated in either the text/body of the email or subject line. The Commissioner put this to the DHSC and also asked the DHSC for details of the searches it had carried out.
15. The DHSC's response maintained the burden of responding to the request would be considerable and now argued that the request should be refused under section 14 FOIA.
16. The Commissioner considers the scope of his investigation is to determine if the DHSC has correctly refused the refined request under section 14 FOIA.

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<sup>1</sup> [ic-270103-l0p7.pdf](#)

## Reasons for decision

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17. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious. It is an absolute exemption and therefore not subject to the public interest test.
18. The word "vexatious" is not defined in FOIA. However, as the Commissioner's guidance on section 14(1) states, it is established that section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
19. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such, it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.
20. However, the ICO recognises that dealing with unreasonable requests can strain resources and get in the way of delivering mainstream services or answering legitimate requests. These requests can also damage the reputation of the legislation itself.
21. Most people exercise their right of access responsibly. However, a few may misuse or abuse FOIA by submitting requests which are intended to be annoying, disruptive or which have a disproportionate impact on a public authority. The Commissioner's guidance on what may typify a vexatious request stresses, however, that it is always the request itself, and not the requestor, which is vexatious. However, a public authority may also consider the context of the request and the history of its relationship with the requester when this is relevant.
22. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal (UT) in the leading case on section 14(1), *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) ("Dransfield"). Although the case was subsequently appealed to the Court of Appeal, the UT's general guidance was supported, and established the Commissioner's approach.
23. Dransfield established that the key question for a public authority to ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
24. The four broad themes considered by the Upper Tribunal in Dransfield were:
  - the burden (on the public authority and its staff);

- the motive (of the requester);
  - the value or serious purpose (of the request); and
  - any harassment or distress (of and to staff).
25. However, the UT emphasised that these four broad themes are not a checklist, and are not exhaustive. Rather, it stressed the:
- “importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests” (paragraph 45).
26. Sometimes it will be obvious that a request is vexatious and other times it will not. In considering such borderline cases, the key is to weigh up any purpose and value that the request represents against any disruption, irritation or distress that compliance with the request may cause the public authority. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request. The UT stated in Dransfield that:
- “all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA” (paragraph 82).

### **The DHSC’s arguments**

27. The DHSC explained the search terms it had used to reach the conclusion there were 6000 emails that would need to be reviewed. It explained that it had used search terms ‘Evusheld’ OR ‘Tixagevimab’ OR ‘Cilgavimab’ OR ‘AZD7742’ AND (participants) ‘ATTF’ OR ‘antiviral’ OR ‘therapeutic’ AND ‘chris whitty’. It argued by using the participant field it was an inclusive strategy and was the default approach taken for searches of this type.
28. The Commissioner had pointed out to the DHSC that the request was only concerned with direct communications between the CMO and the Taskforce so any emails cc’d to the CMO wouldn’t need to be included. The DHSC responded to this point by explaining this is not how it had interpreted the request for the earlier searches. Conducting a fresh search restricting the results to those where the ‘sender’ or ‘to’ contained Chris Whitty’s email address resulted in 1,068 items being returned. Adding an additional filter for the keyword ‘Evusheld’ reduced

the results to 1,008 items and adding in attachments this number increased to 3,106 items.

29. The DHSC considered it would not be proportionate to the relative value of the request to review each of these items to determine if they could be disclosed or information may need to be redacted under any FOIA exemptions. The DHSC argued it would be disruptive to the smooth running of the Department to respond.
30. It clarified the Taskforce closed on 31 March 2023 and the Taskforce owned the policy development of this area. No further policy decisions are expected to be made centrally by the DHSC in relation to the efficacy of Evusheld – a prophylactic treatment for COVID-19.
31. The DHSC explained that prior to the closure of the Taskforce it had allocated one full time employee to deal with FOIA requests from the complainant and other parties regarding the Evusheld decision. This eventually resulted in the section 14(1) decision, upheld by the Commissioner.
32. The DHSC has stated a considerable number of the emails in scope have lengthy attachments. It would need to review each email and attachment to determine if there is any information that needs to be redacted. It acknowledges that due to the passage of time some information that may previously have engaged exemptions may now be suitable for release so some emails/attachments may be able to be released in full or in part. However, a burden still arises from identifying and separating exempt and non-exempt information and applying redactions where needed.
33. In order to do this work the DHSC advised it would need to divert staff from other responsibilities, including working on the Covid Inquiry and supporting the current work of Professor Chris Whitty, who is currently the Interim DHSC Permanent Secretary pending the appointment of a new Permanent Secretary. It is the view of the DHSC that it is not reasonable to comply with this request, particularly as the DHSC is cooperating fully with the independent inquiry chaired by Baroness Hallett to examine the UK's response to and impact of COVID-19.
34. The fourth module of that inquiry (Vaccines and therapeutics (Module 4) - UK Covid-19 Inquiry) has now commenced and the work of the Taskforce is expected to be scrutinised through this process, especially the decision-making around the development of therapeutics for COVID-19. The DHSC believes that the work done on the inquiry is enough to satisfy the need for transparency around this area of work. As part of DHSC's engagement with the inquiry to date, a number of witness statements and a significant volume of documents have already been

submitted, many of which are expected to be published in due course. Professor Whitty is due to appear in front of the Covid Inquiry shortly where he will give evidence on this matter.

35. The DHSC believes that the evidence presented to the Covid Inquiry by Professor Whitty and other Departmental officials will substantially cover the decision-making process for the purpose of transparency, and so the purpose and value of the request are not enough to justify the impact on the public authority.

### **The complainant's view**

36. The complainant had previously argued that their requests were not vexatious, and there is still a significant public interest in the release of the information because these policy decisions have the potential to affect immunocompromised individuals.
37. In specific response to the DHSC's assertions in this case the complainant argues that the number of emails and attachments identified is not a large number and a significant number of the attachments will be duplicated so a review of these will not be onerous. The complainant makes the further point that the DHSC should already have reviewed these anyway for the Covid Inquiry so much of the work will already have been done.
38. The complainant does not consider the burden for reviewing these emails and attachments would be considerable, arguing that if it took 1 minute per item it would mean 60 items could be reviewed in an hour. For the 1,008 emails in scope this would be around 20 hours of work. The complainant does not consider this would be disproportionate given that the DHSC will have to have reviewed them already for the Covid Inquiry.
39. In addition to this they strongly argue that just because the fourth unit of the Covid Inquiry will scrutinise the work of the Taskforce this does not mean that a request can be refused because future events will supersede any public interest in it under FOIA at the time the request is made.
40. The complainant has concerns about the DHSC's responses and the way in which their requests have been handled, arguing that this should be a factor in favour of disclosure as it shows the DHSC has been incorrectly applying the FOIA to refuse their requests.
41. This request was submitted originally in December 2022 receiving a short response that no information was held – a position the complainant did not challenge. The request received the same response when it was re-submitted in March 2024 in light of further information



coming to light. Given the position of the DHSC now that information does exist and is voluminous enough to be overly burdensome, the complainant considers this raises serious concerns about whether the DHSC is actually conducting searches at all when it receives requests.

42. The complainant argues that the time they have invested in these complaints and requests has been substantial and that their time investment should be treated as valuably as the DHSC's time.
43. In terms of previous requests and the earlier decision that a request was 'vexatious' the complainant disputes some of the DHSC's statements from the previous decision notice. They disagree that they have made 40 requests to the DHSC, arguing it was in fact 31 requests. They state that this FOIA request, when made initially in December 2022, was in fact the fifteenth request. The first seven were an attempt to understand the decision making process and committee structures in place at the DHSC.
44. The following nine requests were submitted between October and December 2022. Eight of these asked for details of communications between key individuals at the DHSC in respect of Evusheld for the time period 1 April to 6 September 2022. The complainant explained that the reason that eight requests all about different individuals is that they had no idea how many emails or communications there would be. They state that following these requests in October and November and the refusals by the DHSC to provide information (for a number of reasons) they became aware of the Taskforce mailbox and asked for communications sent to and from this.
45. The complainant explained for the eight requests about communications with individuals the DHSC referred them to NHS England as they stated they did not hold information. The complainant is now concerned that, in light of information being found in this case, it will now be the case that some of the named individuals will appear as sender/recipients in the information that has been deemed 'in scope' of this request.
46. In terms of purpose; the complainant explained that they have been seeking to understand the decision making on Evusheld as other countries have used this for their immunocompromised population who cannot generate a significant antibody response to vaccination. The complainant further explained that Evusheld [was approved](#) by Medicines and Healthcare products Regulatory Agency (MHRA) in March 2022<sup>2</sup> but

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<sup>2</sup> [Evusheld approved to prevent COVID-19 in people whose immune response is poor - GOV.UK](#)



was not provided and many immunocompromised people sought to obtain it privately.

47. During parliamentary sessions between May and July 2022 Ministers stated they had made no decision on the use of Evusheld. As such the complainant was seeking to understand what was happening and why there was a delay. The complainant strongly believes that had the DHSC provided information in response to the earlier requests, in particular this request when it was made in December 2022, they may not have needed to make the subsequent requests and taken up so much of their time and the DHSC's.
48. The complainant is confident that further requests would not have been needed as they are aware another individual has obtained background papers to the Parliamentary Answers provided to Ministers prepared by the Taskforce. These show that the decision not to procure Evusheld was made by Ministers on or before 1 July 2022. Communication of this decision was not made until 6 September 2022 and Evusheld then became available through private prescription routes later in 2022. The complainant argues if the decision had been announced sooner then those willing to pay privately could have obtained Evusheld three months earlier and had three more months of freedom without shielding.
49. The complainant does not accept there is a diminishing public interest in the information simply because there is a public Covid Inquiry that will address some of the issues and scrutinise the Taskforce. The Covid Inquiry is broad and the complainant is not convinced it can drill down in detail on all matters. The complainant argues the delay by the DHSC does not reduce the value of the request but in fact heightens it.

### **The Commissioner's view**

50. In cases where a public authority is relying on section 14(1), it is for the public authority to demonstrate why it considers that a request is a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA. As previously discussed, there is a high bar for engaging section 14(1).

#### **Value or serious purpose**

51. In cases where the issue of whether a request is vexatious is not clear cut, the key test is to determine whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
52. The public interest can encompass a wide range of values and principles relating to what is in the best interests of society, including, but not

limited to: holding public authorities to account for their performance; understanding their decisions; transparency; and ensuring justice.

53. The Commissioner considers there is a clear public interest in this matter. He accepted this in the previous decision as well. The complainant has clearly articulated the importance of the policy decision on the procurement of Evusheld and the impact this has had on some of the immunocompromised population. Understanding why decisions such as this were taken is of great interest to this group of people and will allow for increased scrutiny and understanding.
54. In the previous decision notice the Commissioner had explained that a value or serious purpose could be mitigated if matters had been previously investigated or comprehensively documented. One of the factors he considered was that the Taskforce had already closed and no further information would be created. The DHSC had stated information on the Taskforce had already been provided to the complainant and the Covid Inquiry would scrutinise the work of the Taskforce.
55. The Commissioner found these factors did reduce the value of the request. However, his view on this differs now. The emergence of quite a significant number of in scope emails when it was previously stated no information was held does suggest there is value in the request and the information. Bearing in mind the volume of emails returned was in excess of 6,000 before the complainant agreed to refine the request further. It cannot be said that the matter has been comprehensively documented or that the DHSC has already provided the complainant with information on the Taskforce. It is true that no further information can be created as the Taskforce has been closed but it is not true to say that the actions and decision of the Taskforce had been documented comprehensively.
56. In addition to this the Commissioner accepts that whilst the upcoming module of the [Covid Inquiry<sup>3</sup>](#) will, and now has at the time of this notice, addressed some of the decision making of the Taskforce it does not undermine the value of the request. A request cannot be considered lacking in value simply because information may be disclosed in the future via a public inquiry. It may diminish the value somewhat but it does not erode it completely. Additionally, as the complainant points out, an inquiry will not always be able to address every issue in the level of detail that a requester might want and seeing the emails and background information may add further insight.

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<sup>3</sup> [COVID 20 Jan 25.ecl](#)

## **Burden**

57. The DHSC has not specifically provided an estimate for the amount of work it would have to do to respond to the request other than stating the number of emails and attachments involved that would have to be looked at to determine if they could be disclosed or would need to have information redacted.
58. The Commissioner acknowledges that with the Taskforce closing the DHSC does not have a dedicated resource assigned to deal with requests relating to it and that responding to the request would involve a diversion of resources. A request is more likely to be vexatious when:
- The requestor has asked for a substantial volume of information, and
  - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO, and
  - Any potentially exempt information cannot easily be isolated because it is scattered through the exempt material.
59. The DHSC has not provided a sampling exercise to support its position or explained how long it would take to suitably redact information for disclosure. It is not clear what exemptions may apply to the information and the DHSC has indicated that, due to the passage of time, some of the information may well be able to be disclosed.
60. The Commissioner does not consider 1,008 emails is an excessive number. The DHSC stated that once attachments are included the number of 'items' that would need to be reviewed would be 3,106. These emails and attachments are only those sent directly to or from Professor Whitty with 'Evusheld' in the subject line. The Commissioner considers that a number of these emails may be part of email chains and easily reviewed. Similarly the attachments may be easily identified as duplicates. It is not clear what exemptions might apply to any information in the emails, the Commissioner's previous decision notice suggested if personal data needed to be redacted this would be a straightforward process considering the likely content of the emails and the DHSC's experience of data protection issues. He considers this point is still true.
61. The complainant has made a focused request. They may not have been sure exactly what volume of material would result from the request but they were clear about what the request was trying to achieve – understanding the decisions made around the procurement of Evusheld.

62. The Commissioner does not consider that this request is overly burdensome or that it is anything out of the ordinary in terms of requests received by public authorities. It is asking for a number of communications on a topic over a set time period. The volume of results returned is not outrageously high and it is not clear that preparing this information for disclosure would involve a grossly oppressive burden.

### **Context and history**

63. The context and history of the request is often a major factor in determining whether the request is vexatious and may support the view that section 14(1) applies.
64. The Commissioner notes that the complainant has made a number of requests on this topic to the DHSC. The Commissioner found previously that the complainant's requests on this topic had become vexatious.
65. The requests made by the complainant have been numerous. There appears to be some dispute between the DHSC and the complainant as to how many requests there have been in total but whether this is 31 or 40 this is not an insignificant number. The initial request made for this information was the fifteenth by the complainant's own admission, and followed a series of earlier requests asking for communications between named individuals.
66. When the Commissioner made his previous decision it was on the basis that the DHSC had answered multiple previous requests and that, whilst the request in isolation may not have been vexatious, it showed a pattern of persistent correspondence on a theme. This persistence had seemingly continued despite disclosures.
67. In this case the request is repeated and is on a continuing theme. However, it would be incorrect to say that this request has been made despite disclosures. In fact it has been made as the complainant had reason to question an earlier response that no information in scope of the request was held. The complainant's 'persistence' in this instance had the consequence of uncovering that in fact the DHSC did hold information in scope and that this was not an insignificant number of communications.
68. The Commissioner does not therefore consider that the previous requests and previous decision that requests on this topic may be vexatious can be given too much weight in this case as it is clear that the complainant had a real and tangible reason to question the DHSC on this matter.

69. The complainant has stated their motive for the requests is to find out the truth about decisions made, and the actions of the DHSC in respect of the immunocompromised.
70. The Commissioner acknowledges that there is clearly weighty public interests in the government's handling of the COVID-19 pandemic and how this has affected immunocompromised individuals. Whilst the Covid Inquiry will and has addressed some of the decision making of the Taskforce on the use of Evusheld it does not diminish the interest in seeing the communications that took place at the time the decisions were made. Balanced against this the burden on the DHSC does not seem to be significant enough to outweigh the value of the information to the complainant and the wider immunocompromised population affected by the decisions of the Taskforce.
71. Having balanced the purpose and value of the request against the detrimental effect on the DHSC, the Commissioner is satisfied that the request is not vexatious and the DHSC was not entitled to rely on section 14(1) of FOIA to refuse it.

## Right of appeal

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72. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
74. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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